

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3)
4 THE BANK OF NEW YORK MELLON FKA)
5 THE BANK OF NEW YORK, AS TRUSTEE)
6 FOR THE CERTIFICATEHOLDERS OF)
7 CWALT, INC., ALTERNATIVE LOAN)
8 TRUST 2005-35CB, MORTGAGE PASS-)
9 THROUGH CERTIFICATES, SERIES 2005-)
10 35CB,)

11 Plaintiff,

12 vs.

13 ANDRE BEROUD, *et al.*,

14 Defendants.

Case No.: 2:17-cv-01056-GMN-CWH

ORDER

15 Pending before the Court is the Motion for Partial Summary Judgment, (ECF No. 37),
16 filed by The Bank of New York Mellon (“Plaintiff”). Defendants United Legal Services, Inc.
17 (“ULS”) and Sun City Aliante Community Association (“HOA”) filed Responses, (ECF Nos.
18 39, 40). Additionally, Defendant Red Rock Financial Services, LLC (“Red Rock”) filed a
19 Joinder, (ECF No. 41), to ULS’ Motion. Plaintiff filed a Reply, (ECF No. 43). For the reasons
discussed herein, Plaintiff’s Motion is **GRANTED**.¹

20 **I. BACKGROUND**

21 This case arises out of the non-judicial foreclosure on real property located at 7937 Song
22 Thrush Street, North Las Vegas, Nevada 89084 (the “Property”). (Compl. ¶ 6, ECF No. 1). On
23

24
25 ¹ Also pending before the Court is Red Rock and HOA’s Motions to Dismiss, (ECF Nos. 12, 22), to which ULS
filed Joinders, (ECF Nos. 25, 26). However, because the Court is granting Plaintiff’s Motion for Partial
Summary Judgment in light of *Bourne Valley*, the Court **DENIES** Red Rock and HOA’s Motions to Dismiss as
moot.

1 May 26, 2005, Andre Beroud (“Beroud”) obtained a loan in the amount of \$155,000.00
2 evidenced by a note and secured by a deed of trust (“DOT”) recorded on June 1, 2005. (*See*
3 Deed of Trust, Ex. 1 to Pl.’s Mot. Summ. J. (“MSJ”), ECF No. 38-1). Plaintiff was
4 subsequently assigned the DOT on November 8, 2011, and recorded the assignment on
5 November 14, 2011. (*See* Assignment of Deed of Trust, Ex. 2 to MSJ, ECF No. 38-1).

6 Beroud failed to pay HOA all amounts due and HOA, through its agent Red Rock,
7 recorded a lien for delinquent assessments. (*See* Lien for Delinquent Assessments, Ex. 3 to
8 MSJ, ECF No. 38-1). On April 13, 2012, Red Rock, on behalf of HOA, recorded a notice of
9 default and election to sell pursuant to the lien. (*See* Notice of Default and Election to Sell, Ex.
10 4 to MSJ, ECF No. 38-1). On September 18, 2013, HOA, through its agent ULS, recorded a
11 notice of foreclosure sale. (*See* Notice of Foreclosure Sale, Ex. 5 to MSJ, ECF No. 38-1). HOA
12 foreclosed on the Property on October 11, 2013, and a foreclosure deed was recorded in favor
13 of Defendant 7937 Song Thrush Trust (the “Trust”) on the same day. (*See* Foreclosure Deed
14 Upon Sale, Ex. 6 to MSJ, ECF No. 38-1).

15 Plaintiff filed its Complaint on April 14, 2017, asserting the following causes of action
16 arising from the foreclosure and subsequent sale of the Property: (1) quiet title and declaratory
17 relief against all Defendants; (2) judicial foreclosure against Beroud; (3) breach of contract
18 against Beroud; (4) injunctive relief against the Trust; (5) breach of Nevada Revised Statute
19 (“NRS”) § 116.1113 against HOA, Red Rock, and ULS; (6) wrongful foreclosure against HOA,
20 Red Rock, and ULS; and (7) violation of the Nevada Deceptive Trade Practices Act under NRS
21 Chapter 598 against HOA, Red Rock, and ULS. (Compl. ¶¶ 24–91).

22 **II. LEGAL STANDARD**

23 The Federal Rules of Civil Procedure provide for summary adjudication when the
24 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
25 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant

1 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
2 may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
3 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to
4 return a verdict for the nonmoving party. *Id.* “Summary judgment is inappropriate if
5 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
6 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
7 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
8 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
9 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

10 In determining summary judgment, a court applies a burden-shifting analysis. “When
11 the party moving for summary judgment would bear the burden of proof at trial, it must come
12 forward with evidence which would entitle it to a directed verdict if the evidence went
13 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
14 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
15 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
16 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
17 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
18 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
19 party failed to make a showing sufficient to establish an element essential to that party’s case
20 on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 323–24. If
21 the moving party fails to meet its initial burden, summary judgment must be denied and the
22 court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S.
23 144, 159–60 (1970).

24 If the moving party satisfies its initial burden, the burden then shifts to the opposing
25 party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*

1 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
2 the opposing party need not establish a material issue of fact conclusively in its favor. It is
3 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
4 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
5 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
6 summary judgment by relying solely on conclusory allegations that are unsupported by factual
7 data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
8 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
9 competent evidence that shows a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324.

10 At summary judgment, a court’s function is not to weigh the evidence and determine the
11 truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The
12 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
13 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
14 significantly probative, summary judgment may be granted. *Id.* at 249–50.

15 **III. DISCUSSION**

16 Plaintiff moves for partial summary judgment on its first cause of action for quiet title
17 and declaratory relief. (MSJ 2:1–2, ECF No. 37). The Court first considers the impact of the
18 Ninth Circuit’s ruling in *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154
19 (9th Cir. 2016), *cert. denied*, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017), before
20 turning to the merits of Plaintiff’s Motion.

21 **A. The Scope and Effect of *Bourne Valley***

22 In *Bourne Valley*, the Ninth Circuit held that NRS § 116.3116’s “‘opt-in’ notice scheme,
23 which required a homeowners’ association to alert a mortgage lender that it intended to
24 foreclose only if the lender had affirmatively requested notice, facially violated the lender’s
25 constitutional due process rights under the Fourteenth Amendment to the Federal Constitution.”

1 *Bourne Valley*, 832 F.3d at 1156. Specifically, the Court of Appeals found that by enacting the
2 statute, the legislature acted to adversely affect the property interests of mortgage lenders, and
3 was thus required to provide “notice reasonably calculated, under all circumstances, to apprise
4 interested parties of the pendency of the action and afford them an opportunity to present their
5 objections.” *Id.* at 1159. The statute’s opt-in notice provisions therefore violated the Fourteenth
6 Amendment’s Due Process Clause because they impermissibly “shifted the burden of ensuring
7 adequate notice from the foreclosing homeowners’ association to a mortgage lender.” *Id.*

8 The necessary implication of the Ninth Circuit’s opinion in *Bourne Valley* is that the
9 petitioner succeeded in showing that no set of circumstances exists under which the opt-in
10 notice provisions of NRS § 116.3116 would pass constitutional muster. *See, e.g., United States*
11 *v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the
12 most difficult challenge to mount successfully, since the challenger must establish that no set of
13 circumstances exists under which the Act would be valid.”); *William Jefferson & Co. v. Bd. of*
14 *Assessment & Appeals No. 3 ex rel. Orange Cnty.*, 695 F.3d 960, 963 (9th Cir. 2012) (applying
15 *Salerno* to facial procedural due process challenge under the Fourteenth Amendment). The fact
16 that a statute “might operate unconstitutionally under some conceivable set of circumstances is
17 insufficient to render it wholly invalid.” *Salerno*, 481 U.S. at 745. To put it slightly differently,
18 if there were any conceivable set of circumstances where the application of a statute would not
19 violate the constitution, then a facial challenge to the statute would necessarily fail. *See, e.g.,*
20 *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to
21 a statute necessarily fails if an as-applied challenge has failed because the plaintiff must
22 “establish that no set of circumstances exists under which the [statute] would be valid”).

23 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS
24 § 116.3116, which it pinpointed in NRS 116.3116(2). *Bourne Valley*, 832 F.3d at 1158. In
25 addition, this Court understands *Bourne Valley* also to invalidate NRS 116.311635(1)(b)(2),

1 which also provides for opt-in notice to interested third parties. According to the Ninth Circuit,
2 therefore, these provisions are unconstitutional in each and every application; no conceivable
3 set of circumstances exists under which the provisions would be valid. The factual
4 particularities surrounding the foreclosure notices in this case—which would be of paramount
5 importance in an as-applied challenge—cannot save the facially unconstitutional statutory
6 provisions. In fact, it bears noting that in *Bourne Valley*, the Ninth Circuit indicated that the
7 petitioner had not shown that it did not receive notice of the impending foreclosure sale. Thus,
8 the Ninth Circuit declared the statute’s provisions facially unconstitutional notwithstanding the
9 possibility that the petitioner may have had actual notice of the sale.

10 HOA also argues that NRS § 107.090, which requires that copies of the notice of default
11 and election to sell, and the notice of sale be mailed to each “person with an interest” or
12 “claimed interest” that is “subordinate” to the HOA’s super-priority, is incorporated into NRS
13 Chapter 116 by NRS § 116.31168. (HOA’s Resp. 12:22–13:14, ECF No. 40). However,
14 *Bourne Valley* expressly rejected this argument. *Bourne Valley*, 832 F.3d at 1159 (“If section
15 116.31168(1)’s incorporation of section 107.090 were to have required homeowners’
16 associations to provide notice of default to mortgage lenders even absent a request, section
17 116.31163 and section 116.31165 would have been meaningless.”). Therefore, the Court
18 declines to adopt this interpretation.

19 **B. Severability**

20 HOA further argues that the Court should sever the unconstitutional provisions of NRS
21 116 and enforce the remaining statute. (*See* HOA’s Resp. 9:7–20). This approach, however,
22 would leave the statute without any notice provision. The absence of a notice requirement
23 would raise additional constitutional due process challenges, which is “inconsistent with
24 established precedent holding that courts ought to construe statutes so as to avoid constitutional
25 infirmities.” *See PNC Bank, N.A. v. Wingfield Springs Cmty. Ass’n*, No. 3:15-cv-00349-MMD-

1 VPC, 2017 WL 4172616, at *4 (D. Nev. Sept. 20, 2017) (denying defendants’ severability
2 argument based on potential due process issues). The Court therefore rejects this argument.

3 Accordingly, HOA foreclosed under a facially unconstitutional notice scheme, and thus
4 the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet title
5 as a matter of law in favor of Plaintiff as assignee of the DOT.

6 **C. Plaintiff’s Remaining Claims for Violation of NRS § 116.1113, Wrongful**
7 **Foreclosure, Violation of the Nevada Deceptive Trade Practices Act, and**
8 **Injunctive Relief**

9 In its prayer for relief, Plaintiff requests primarily a declaration that the Trust purchased
10 the property subject to Plaintiff’s DOT. (*See* Compl. 13:24–26). With respect to Defendants
11 Red Rock, HOA, and ULS, the other relief Plaintiff requests is phrased in the alternative. (*See*
12 *id.* 14:1–5). Therefore, because the Court grants summary judgment for Plaintiff on its quiet
13 title claim, Plaintiff has received the relief it requested. Accordingly, the Court dismisses
14 Plaintiff’s fifth, sixth, and seventh causes of action.

15 With regard to Plaintiff’s request for a preliminary injunction against the Trust pending a
16 determination by the Court concerning the parties’ respective rights and interests, the Court’s
17 grant of summary judgment for Plaintiff moots this claim, and it is therefore dismissed.

18 **IV. CONCLUSION**

19 **IT IS HEREBY ORDERED** that Plaintiff’s Motion for Partial Summary Judgment,
20 (ECF No. 37), is **GRANTED** pursuant to the foregoing.

21 **IT IS FURTHER ORDERED** that Red Rock’s Motion to Dismiss, (ECF No. 12), is
22 **DENIED as moot.**

23 **IT IS FURTHER ORDERED** that HOA’s Motion to Dismiss, (ECF NO. 22), is
24 **DENIED as moot.**

IT IS FURTHER ORDERED that the parties shall submit a joint status report identifying whether there are any non-moot claims remaining in light of this Order. The parties shall have twenty-one (21) days from the date of this Order to file the status report. Failure to do so will result in the Court dismissing the remaining claims as moot and closing the case.

DATED this 23 day of March, 2018.

Gloria M. Navarro, Chief Judge
United States District Judge